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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. ABRAHAM VARGAS, Defendant and Appellant.	B283501 Los Angeles County Super. Ct. No. BA431537

APPEAL from an order and a judgment of the Superior Court of Los Angeles County, Katherine Mader and Larry P. Fidler, Judges. Affirmed.

Brad Kaiserman, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Margaret E. Maxwell and Douglas L. Wilson, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant and appellant Abraham Vargas of eight counts of lewd act on a child under 14 involving two victims. On appeal, Vargas does not challenge the evidence against him. Instead, he contends the superior court abused its discretion in denying his motion to sever the counts involving the two victims. We find no abuse of discretion and affirm.

FACTS AND PROCEDURAL BACKGROUND

1. *Ana Z.*

Vargas is Ana Z.'s[1] uncle. He is her mother's brother. When Ana was in the first grade, she and Vargas were playing basketball one day. Vargas "grabbed [Ana's] ass" and kissed her on the mouth. Ana told her mom because she was scared. Ana's mom said it was probably an accident. Ana's mom's response made Ana feel sad. Ana's mother did not take her to the police.

Ana then told her first grade teacher, Sandra Montalvo. Montalvo called "the counselor at the school." The school "made a report" to "a social worker." The social worker spoke with Ana.

When Ana was six or seven, she and her mother moved into a house in East Los Angeles. Vargas moved in too. Vargas "continue[d] to touch [Ana's] private parts" until she was in the fourth grade. Vargas would call Ana into his room. No one else was home. Vargas touched Ana two or three times a week.

Vargas touched Ana's vagina with his hand and rubbed it with his fingers. Sometimes Vargas put his hand under Ana's clothes. The contact sometimes was skin to skin. Vargas also had Ana touch his penis. He put her hand on his penis and

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[1] We refer to the victims by their first names. (Cal. Rules of Court, rule 8.90(b)(4).)

moved it back and forth. Vargas told Ana he would kill her mother. Ana didn't tell anyone what Vargas was doing to her.

When Ana was nine or 10, Vargas "licked" her vagina. He pulled her pants and underwear off and "tr[ied] to put his face near [her] vagina." Ana kicked and told him no. Vargas managed to get Ana's legs open and licked her vagina. Ana tried to get away but could not.

When Ana's mother came home from the store later that day, Ana told her what Vargas had done. Ana's mom said she would talk to Vargas and "kick him out of the house." Ana and her mom decided not to tell anyone else. Ana's mother did not take her to the police that day or ever. Ana's mother in fact did not kick Vargas out, and he continued to live there until about 2013 when Ana was 14 or 15. Vargas stopped touching Ana but he would "look at [her] like he was checking [her] out" when she was 12 or 13.

When Ana was in high school, a social worker came to her house. She also spoke with the police.

2. *Tania C.*

Tania C.'s mother Claudia was a close friend of Vargas's girlfriend Beatrice. Tania first met Vargas when she was about nine years old. Beatrice and Vargas would visit Claudia and Tania; Claudia and Tania would visit Beatrice and Vargas.

Eventually, Beatrice and Vargas had a child. Tania would go to Beatrice's and Vargas's home to help Beatrice with the baby.[2] Tania noticed Vargas staring at her "often"; she was 13 at the time and in eighth grade. Vargas sat near Tania when he

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[2] This was the same house where Vargas lived with Ana, her mother, and other relatives.

had the chance. Tania "just knew it was something strange" and it made her uncomfortable. Vargas was 24 years old.

In December 2011, Vargas touched Tania's foot with his foot while they were waiting near a Christmas religious display. Vargas also took an ornament off the Christmas tree and gave it to Tania, "saying that it was a gift from him."

Tania next saw Vargas at a New Year's Eve party. Vargas told Tania he wanted to see her "in [her] home or his home." Tania "asked where that would be." Vargas asked if she had a cell phone and gave her his number. At some point Tania went outside to look for one of her siblings. Vargas came toward her and tried to hug her, but Tania stepped away. Tania tried to go around Vargas but he "pulled" her, "hugged" her, "and then later kissed [her]" on the mouth with his tongue. At first, Tania tried unsuccessfully to push Vargas away but then she kissed him back.

The next day, Tania called Vargas. She asked him why he had kissed her and he said he liked her. He proposed they meet at a bridge near Tania's house. Tania met Vargas at the bridge; they got into his SUV and he drove to a park. Vargas told Tania he really liked her, he was with Beatrice only because of the baby, and he was going to leave Beatrice. Tania and Vargas sat on the grass at the park; he kissed her, using his tongue, and she kissed him back.

They returned to Vargas's car and Vargas asked Tania to sit in the back seat. She did. Vargas got in the back seat too and they kissed. Vargas tried to unbutton Tania's pants and take them off but she held them up. He told her "to just let him because he really liked [her] and it was nothing bad." Tania

"believed him" so let him remove her pants and underwear. Vargas touched Tania's vagina with his fingers.

About two hours after they had met on the bridge, Vargas dropped Tania off at a park where she met her sister.

On January 9, 2012, Tania was walking to school when she heard someone call her name. It was Vargas, standing outside his SUV. Tania went with Vargas, "[b]ecause he asked [her] to." "[H]e just told [her] to get in the car and [she] did."

Vargas drove Tania to his house. No one was home. Vargas and Tania went into his brother's bedroom. The television was on. Vargas turned up the volume and asked Tania to sit on the couch. He sat next to her and hugged her.

There were blankets on the floor. Vargas pulled Tania to the floor, laid her on her back, kissed her, and tried to pull down her pants. At first Tania kept saying no but Vargas "used strength." "He pushed himself onto her. She told him she didn't want to do it, and he just continued to hug on her, kiss on her, touch her." Vargas was lifting Tania's shirt and trying to pull her pants down. She told him "stop, don't, don't, don't do it," but he shushed her and put his finger to his mouth "saying for [her] to be quiet."

Tania continued to hold her pants. Vargas kept trying with one hand to take Tania's pants off; with the other hand he was unbuckling his own pants. Tania tried to stand up but Vargas pulled her down. Tania was scared; Vargas was "being different"—"like [she] didn't know him." She had "never seen him like that." He pulled her pants and underwear off. Vargas's pants were around his knees. Tania saw his penis; it was hard.

Vargas told Tania to open her legs. She didn't. He opened her legs with his hands. She "kept on trying to close them with

. . . the strength, little or big, that [she] had" "but he was way stronger." Vargas put his penis into Tania's vagina. He was on top of her. She was not able to move because he was very heavy and big. Vargas ejaculated.

Afterward, Vargas sat next to Tania on the sofa and told her he loved her and "he didn't mean any harm." Vargas told Tania he couldn't take her to school so she "had to go on [her] own."

Sometime after January 9, Vargas took Tania to a clinic for a pregnancy test and a "Plan B" pill. Tania used a fake name and date of birth. The clinic also gave Tania birth control pills.

Tania continued to call Vargas on his cell phone through January and February of 2012. Tania ditched school to see Vargas. Sometimes he would pick her up around the corner from her house. Twice he picked her up from school. Tania and Vargas had sex in his car on more than one occasion. They also had intercourse at Vargas's house two or three times.

In late July 2012, Tania was at Vargas's house for a birthday party for Vargas's and Beatrice's one-year-old son. The party was outside. Tania went inside to use the bathroom; Vargas followed her in and closed the door behind him. Vargas pulled Tania's pants and underwear down and put his penis in her vagina.

Another day, Vargas picked Tania up. Vargas had his son in the car and he drove to Toys 'R' Us. Vargas got into the back seat with Tania. Vargas pulled Tania's pants down and asked her to turn around. Vargas tried to put his penis in Tania's anus. She got very angry, started crying, and told him to stop. Vargas then put his fingers into Tania's anus instead.

Once, Vargas took Tania to a motel. They watched television, then had sex. Vargas told Tania to turn around but she refused. He "grabbed [her] back and turned [her] like forcing [her] to turn." Vargas held Tania's hands together above her head. She was face down on the bed. "[M]ost of his body [was] on top of [Tania]" and he "was too heavy for [her] to . . . move or get out." Vargas put his penis in Tania's anus. She "felt pain, really, really bad pain." Tania was sobbing and telling Vargas to stop. He told her to be quiet and not to yell.

In August 2012 Tania finally told her mother about Vargas. Tania's mother took her to the sheriff's station.

Neither Ana nor Tania ever spoke with the other about what Vargas had done to them.

3. *The charges and the motion to sever*

The People charged Vargas with four counts of committing a lewd or lascivious act on a child under 14 in violation of Penal Code section 288, subdivision (a), as to Ana (counts 1 through 4) and five counts of that same offense as to Tania (counts 5 through 9). The People alleged under section 667.61, subdivisions (b) and (e)(4), that Vargas committed the offenses against more than one victim. The People also alleged under section 1203.066, subdivision (a)(8), that Tania C. was under the age of 14 and that Vargas had substantial sexual contact with her.

On June 2, 2016, defense counsel filed a motion to sever the counts concerning Ana from those concerning Tania. Counsel argued none of the evidence about the two victims would be cross-admissible, the evidence regarding Ana—Vargas's young niece—would inflame the jury, and the prosecution's case as to Ana was "extremely weak."

The parties appeared in the calendar court before Judge Katherine Mader on June 3, 2016. Judge Mader said she had read the severance motion, was familiar with the governing law, and would read the preliminary hearing transcript over the weekend. The court discussed the issues with counsel and asked a number of questions.

The parties returned to Judge Mader's courtroom on June 7, 2016. Judge Mader confirmed she had read the preliminary hearing transcript as well as defense counsel's declaration and reviewed the case law. Defense counsel argued Ana's case was "clearly weaker" than Tania's and the Department of Children and Family Services (DCFS) had found Ana's allegations "unfounded" in 2006. Counsel also noted Ana's testimony at the preliminary hearing included more allegations than she initially had made to the DCFS investigator.

The prosecutor argued that additional detail could be explained by Ana's age in 2006 and then in 2015. The prosecutor said, "[A]t the time she made [the] initial disclosure she was a child, seven years old. [¶] And when she was reinterviewed or testified at the preliminary hearing, she was an adolescent, more articulate and perhaps being more willing to be forthcoming about what the defendant had done to her." The prosecutor also argued the evidence as to the two victims would be cross-admissible under Evidence Code section 1108.[3]

Judge Mader ruled:

"[A]s we all know, the state has a strong interest in the efficiency of joint trials. And as such, [the law]

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[3] Undesignated statutory references are to the Evidence Code.

require[s] the defense not just to show prejudice . . . but to make a clear showing of prejudice. I do not believe that has been shown here. [¶] Both offenses are of the same type. I don't know that one is any more inflammatory than the other. Because of the passage of 1108, I do believe that each of these offenses would be cross-admissible. And of course, 1108 does not require similarity. The earlier offense is not particularly remote. And I'm not so sure that it [is] particularly weak. [¶] In reading the testimony at the preliminary hearing of the first victim, she clearly was not willing to go beyond certain allegations. She said she didn't remember certain things. But she did remember other things, which made her, to me, more credible. [¶] I think that there are many reasons why a case, particularly a sex case, does not get filed when there is only one victim. I think a lot of times law enforcement generally waits to see if somebody else comes forward with a complaint against the same suspect. [¶] The fact is that, according to the first victim, she was being molested when she was between the 2nd and 4th grades. And the second victim met the defendant, who started, in a sense, grooming her for a sexual relationship when she was 11 or 12, which would place her around the 6th grade. [¶] So he clearly in both cases is attracted to very young girls and wants to get involved in similar types of sexual acts with them. [¶] They both involve [a] certain peculiar type of coercion. And while the teacher didn't believe

> the—or said that the victim is a—or is going to say that the victim on the first instance was a liar, it seems to me that—and we always tell jurors . . . that people can lie about some things and tell the truth about others. [¶] So I don't know what she was lying about, whether she was lying about a dog ate her homework versus these sexual attacks by the defendant. And I think it's just a jury question factually as to what is true and what is not true. [¶] So for all of those different reasons, I am going to deny the motion to sever."

4. *The defense witnesses at trial*

Vargas called several witnesses at trial to challenge Ana's and Tania's credibility.

Ana's elementary school teacher[4] testified she remembered Ana but not much else, as ten years had passed. Ana was "[j]ust [a] typical little girl." After counsel refreshed her recollection with her notes, the teacher testified she had written Ana "need[ed] to work [on] telling the truth." The teacher said she was hesitant to report Ana's allegations about Vargas "because there were quite a few different stories."

Rudy Perez was a social worker with DCFS in 2006. Perez had read his notes and report to refresh his recollection. Perez interviewed Ana, "parents," the teacher, and "the alleged perpetrator." Ana did not tell Perez that Vargas had "grabbed [her] butt" or kissed her on the mouth while playing basketball. Ana told Perez she had been jumping on Vargas's bed, he grabbed her by the arm and scolded her, then gave her a kiss on the cheek

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[4] By the time of trial, Sandra Montalvo was Sandra Macias.

to say he was sorry. Ana told Perez she "apologized for lying." On cross-examination, Perez admitted Ana told him Vargas kissed her on the mouth. Ana then pointed to "an area that included her cheek and her mouth."

George Wilson investigates major assault crimes for the Los Angeles Police Department. He interviewed Tania in May 2014 and he observed Tania's interview at Stuart House in July 2014. Tania said she and Vargas never had anal sex, although he attempted anal sex during the Toys 'R' Us incident.

5. *The verdicts and sentence*

The jury convicted Vargas on all counts.[5] The trial court sentenced Vargas to 45 years to life in the state prison. The court imposed sentences of 15 years to life on counts 1, 2, and 5, all to run consecutively. The court sentenced Vargas to concurrent terms of 15 years to life on counts 3, 4, 6, 7, and 8.

DISCUSSION

1. *The governing law*

Penal Code section 954 authorizes the joinder of charged offenses connected together in their commission or belonging to the same class of crimes. "[B]ecause consolidation or joinder of charged offenses ordinarily promotes efficiency, that is the course of action preferred by the law." (*Alcala v. Superior Court* (2008) 43 Cal.4th 1205, 1220 (*Alcala*); *People v. Manriquez* (2005) 37 Cal.4th 547, 574 (*Manriquez*) [" 'The law prefers consolidation of charges.' "].) Offenses may be joined even if they " ' "do not

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[5] At the conclusion of the evidence, the trial court granted a defense motion under Penal Code section 1118.1 to dismiss count 9 because Tania was 14 years old on the date of the alleged offense. The prosecutor conceded the merit of that motion.

relate to the same transaction and were committed at different times and places . . . against different victims." ' " (*Alcala*, at p. 1218, italics omitted.)

"Because the charges in this case all alleged offenses of the same class, the statutory requirements for joinder were satisfied." (*People v. Kraft* (2000) 23 Cal.4th 978, 1030 (*Kraft*).) Accordingly, Vargas "can predicate error in denying the motion to sever only upon a clear showing of potential prejudice." (*People v. Bradford* (1997) 15 Cal.4th 1229, 1315.) We review a trial court's denial of a motion to sever for an abuse of discretion (*Kraft,* at pp. 1030, 1032), that is, whether the denial fell " 'outside the bounds of reason.' " (*People v. Ochoa* (1998) 19 Cal.4th 353, 408 (*Ochoa*).) " 'The state's interest in joinder gives the court broader discretion in ruling on a motion for severance than it has in ruling on admissibility of evidence.' " (*Alcala*, *supra*, 43 Cal.4th at p. 1221; cf. *People v. Arias* (1996) 13 Cal.4th 92, 127 ["Because of the factors favoring joinder, a party seeking severance must make a stronger showing of potential prejudice than would be necessary to exclude other-crimes evidence in a severed trial."].)

Our Supreme Court has developed criteria to guide evaluations of trial court decisions on severance motions. Refusal to sever may be an abuse of discretion where: (1) evidence on the crimes to be jointly tried would not be cross-admissible in separate trials; (2) certain of the charges are unusually likely to inflame the jury against the defendant; and (3) a "weak" case has been joined with a "strong" case, or with another "weak" case, so that the "spillover" effect of aggregate evidence on several charges might well alter the outcome of some or all of the charges. (*Manriquez*, *supra*, 37 Cal.4th at p. 574;

Kraft, *supra*, 23 Cal.4th at p. 1030.)[6] "Cross-admissibility of evidence is sufficient but not necessary to deny severance." (*Manriquez*, at p. 574.) Our Supreme Court "frequently [has] observed that if evidence underlying the offenses in question would be 'cross-admissible' in separate trials of other charges, that circumstance normally is sufficient, standing alone, to dispel any prejudice and justify a trial court's refusal to sever the charged offenses." (*Alcala*, *supra*, 43 Cal.4th at p. 1221.)

In determining whether a trial court abused its discretion under section 954 in declining to sever properly joined charges, we consider the record before the trial court when it made its ruling. (*People v. Merriman* (2014) 60 Cal.4th 1, 37-38, 46-49; *People v. Soper* (2009) 45 Cal.4th 759, 774 (*Soper*).) But even if a trial court's severance or joinder ruling is correct at the time it was made, a reviewing court will reverse the judgment if the defendant shows joinder actually resulted in "gross unfairness" amounting to a denial of due process. (*People v. Ybarra* (2016) 245 Cal.App.4th 1420, 1434 (*Ybarra*); *People v. Mendoza* (2000) 24 Cal.4th 130, 162.) The defendant must demonstrate "it is 'reasonably probable that the jury was influenced [by the joinder] in its verdict of guilt.' " (*Merriman*, at p. 49.) Our Supreme Court has described a defendant's burden to establish gross unfairness as a " 'high burden.' " (*Ybarra*, at p. 1438.)

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[6] The fourth criterion—whether any of the charges is a potential capital offense (*People v. Marshall* (1997) 15 Cal.4th 1, 27-28)—does not apply here.

2. *The court did not abuse its discretion in denying Vargas's motion to sever*

All of the charges against Vargas alleged violation of the same provision of the Penal Code—lewd act on a child under 14. Accordingly, section 1108 authorized their joinder. Vargas contends, however, the evidence as to Ana and Tania was not cross-admissible under section 1108 because section 352 would have "prohibited" it. Vargas says the offenses against the two victims "were of a very different nature" because Ana was "a child under the age of ten" and Tania was a "teenager" with whom Vargas had "a dating relationship." Vargas asserts the case was "much weaker" as to Ana and her allegations against Vargas were "significantly more inflammatory than the allegations by Tania." Vargas also argues cross-admission of the evidence would have required "a significant consumption of time."

We disagree. First, as the Attorney General points out, the prosecution alleged Vargas committed the offenses against multiple victims under Penal Code section 667.61. To prove this allegation, the prosecution had to present evidence as to both Ana and Tania. Vargas's only response to this is "[t]he special allegation . . . could have been bifurcated in order to protect [his] right to a fair trial." Vargas fails to consider the practical problems the trial court properly could take into account in denying his severance motion: In a trial involving only Tania, there would be no opportunity to voir dire prospective jurors on their views about molestation of a six or seven-year-old child. If the jury returned a guilty verdict on the crimes against Tania, the judge then would have to tell the jurors they would be serving for another week or more to hear testimony about Ana. Any such

bifurcation certainly would result in the undue consumption of time Vargas warns against.

Second, cross-admissibility of evidence is not required. Our Supreme Court "repeatedly [has] found a trial court's denial of a motion to sever charged offenses to be a proper exercise of discretion *even when the evidence underlying the charges would not have been cross-admissible in separate trials*." (*Alcala*, *supra*, 43 Cal.4th at p. 1221. See also *Belton v. Superior Court* (1993) 19 Cal.App.4th 1279, 1286 (*Belton*) ["the absence of cross-admissibility does not preclude joinder"]; Pen. Code, § 954.1.) In any event, here—as Judge Mader noted—the evidence was cross-admissible under section 1108 and section 352 did not require its exclusion.[7] As to both victims, Vargas took advantage of positions of trust he enjoyed because of family relationships and close friendships. Vargas's molestation of Ana began when she was in first or second grade and stopped when she was in fourth grade after she again told her mother what Vargas was doing to her. Even after that, Vargas continued to look at Ana as if "checking her out" when she was 12 and 13. Vargas's pursuit of Tania began when she was 13 and one-half, and in eighth grade. She was barely a teenager.

Both victims resisted Vargas to some extent. Ana tried to kick him when he tried to lick her vagina. He was able to open Ana's legs nevertheless. The first time Vargas had intercourse with Tania she told him no and tried to hold onto her pants. She refused to follow his instructions to open her legs and tried

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[7] Because we conclude the evidence as to the two victims was cross-admissible under section 1108, we need not address whether it also would have been admissible under section 1101, subdivision (b).

to keep them closed. He forced them open because he was much stronger. Both victims tried to get away at one point but Vargas used his strength to keep them in place. The testimony of each victim was probative as to Vargas's conduct toward the other victim, and that probative value was not outweighed by a substantial risk of undue prejudice. (Cf. *People v. Poon* (1981) 125 Cal.App.3d 55, 69, 74 [pre-1108 case; charges of lewd act on a child, assault with intent to commit rape, rape, and false imprisonment were properly joined; " 'common elements' " included "sexual motivation and young girl victims"; "sexual activity associated with juvenile victims characterized both offenses"].)

Nor is it clear—as Vargas contends—that jurors would view the evidence as to Ana as much more inflammatory than the evidence as to Tania. Certainly jurors would not approve of Vargas's conduct with Ana. But his acts with Tania involved forcing himself on her for both vaginal intercourse and anal penetration, even though she told him no, tried to hold onto her clothes, and cried from pain. His conduct subjected her to a risk of pregnancy. Because of Vargas, Tania missed school and lied to her mother. Vargas preyed on Tania's emotions, telling the young adolescent that he loved her and would leave the mother of his infant to be with her. (Cf. *Ochoa*, *supra*, 19 Cal.4th at p. 409 [no gross unfairness in denial of severance motion; "[a]ll of the charges [sexual assault of one victim and rape and murder of another] were quite inflammatory in nature"].)

Finally, the case involving Ana was not significantly weaker than the case involving Tania. While Ana answered "I don't remember" to a number of questions at trial given the passage of time, she did testify in some detail about Vargas's

acts. Jurors heard from witnesses Vargas presented to call into question Ana's credibility, and then reached their own conclusions. "In order to demonstrate the potential for a prejudicial spillover effect, defendant must show an 'extreme disparity' in the strength or inflammatory character of the evidence." (*Ybarra*, *supra*, 245 Cal.App.4th at p. 1436. See also *Belton, supra,* 19 Cal.App.4th at p. 1284. Cf. *Frank v. Superior Court* (1989) 48 Cal.3d 632, 641 [rape charges involving two victims properly joined; "[t]he prosecution's evidence, as is frequently the case when rape is the charge, consists primarily of the testimony of the victims"; victims' "credibility will be a matter for the jury"].)

After considering all of these facts, we conclude Vargas has failed to carry his burden of making the clear showing of prejudice required to establish that the superior court abused its discretion in denying his severance motion. (*Soper*, *supra*, 45 Cal.4th at p. 783; *Alcala*, *supra*, 43 Cal.4th at p. 1229; *Ybarra*, *supra*, 245 Cal.App.4th at p. 1438.) Vargas "has not demonstrated that the potential for substantial prejudice outweighs the well-recognized benefits to the state from joinder of cases." (*Belton*, *supra*, 19 Cal.App.4th at p. 1288.)

DISPOSITION

We affirm Abraham Vargas's conviction.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EGERTON, J.

We concur:

LAVIN, Acting P. J.

DHANIDINA, J.